Filed 5/14/19 Kaplan v. Wickes CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL R. KAPLAN,

Plaintiff, Cross-defendant and Respondent,

v.

MYRNA WICKES,

Defendant, Cross-defendant and Respondent;

CALVADA RETAIL GROUP, INC.

Defendant, Cross-complainant and Appellant.

G055520

(Super. Ct. No. 30-2015-00774882)

ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed on April 16, 2019 be modified as follows:

On page three, the first full paragraph, beginning with "The trial court's error was harmless," is deleted and the following two paragraphs are inserted in its place:

However, Calvada forfeited the error by failing to object. Even when the trial court made its decision and rendered judgment, Calvada made no objection or

represented in any manner it had more evidence to present. Calvada did not bring a motion for a new trial. Any error by the trial court therefore was forfeited.

In addition, there is sufficient evidence in the record to support the finding the lease extension was procured by exertion of undue influence over Myrna. This finding fully supports the judgment. Calvada had the full opportunity to present evidence and argument on the issue of undue influence. We therefore affirm.

On page 14, the second full paragraph immediately preceding Roman numeral II, beginning with "The trial court's error, though serious," is deleted and the following six paragraphs are inserted in its place:

But Calvada forfeited any claim of error. Calvada's counsel did not pose an objection or represent in any manner that Calvada had more evidence to present or that is was inappropriate to render judgment at that time.

"'[A]s a general rule, "the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal." [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.] [¶] The reasons for the rule are these: "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"'" (*People v. Salazar* (2016) 63 Cal.4th 214, 239-240; see *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 48 ["Forfeiture of issues on appeal typically occurs when a party fails to object"]; *Villanueva v. Fidelity National Title Co.* (2018) 26 Cal.App.5th 1092, 1114 ["Generally, trial court error is waived by implication or deemed forfeited when the

appellant fails to bring the alleged error to the trial court's attention by timely motion or objection"].)

At no point during trial did Calvada object to the order of proof, the division of trial into phases, or rendition of judgment after Phase II had been completed. When the trial court expressly, specifically, and clearly stated that Calvada's case was "gone" and Kaplan and Myrna were entitled to judgment, Calvada's counsel did not object. Calvada's counsel never informed the court that Calvada had additional evidence to present. Calvada did not request a statement of decision, and objections to the proposed judgment do not appear in the record.

Most significantly, Calvada did not bring a motion for a new trial. The very first statutory ground for a new trial is "Irregularity in the proceedings of the court. . . or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." (Code Civ. Proc., § 657, subd. (1).) Calvada did not in any manner bring the claimed error to the trial court's attention before initiating this appeal. Given this repeated failure to object and failure to bring a new trial motion, Calvada forfeited its claim that the trial court erred by rendering judgment after trial on Kaplan's and Myrna's affirmative defenses.

A party is excused from forfeiture if an objection would have been futile. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406.) Calvada asserts that objecting at the point when the trial court made its decision would have been futile because the court had "brusquely" stated it did not want to hear oral argument. But an objection is not the same as oral argument, and it is speculation to suggest the trial would have treated an objection as argument and rejected it out of hand. Further, the court's comments about oral argument when rendering its decision would not excuse a repeated failure to object, failure to object to the proposed judgment, or failure to bring a motion for a new trial.

As we explain in the next section, substantial evidence supported the finding that the lease extension was procured by undue influence. In its petition for

rehearing, Calvada argues that in its appellant's opening brief, Calvada asserted it would have introduced evidence to show that Kaplan and Myrna did not satisfy an element of undue influence. Calvada has not identified what that evidence would be other than to say that Danesh would provide it. At oral argument on appeal, counsel for Calvada represented that, when the trial court asked if Calvada wished to defer to its case-in-chief, Calvada did so with the understanding that its affirmative defenses of authorization and ratification would be heard at a later time. Undue influence was Kaplan's and Myrna's affirmative defense. Calvada had full opportunity to cross-examine Myrna and Forster, and to examine Danesh, on the issue of undue influence.

On page 18, the last full paragraph, beginning with "Calvada does not contend," is deleted.

The modification does not change the judgment.

Calvada Retail Group Inc.'s petition for rehearing is denied.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.

Filed 4/16/19 Kaplan v. Wickes CA4/3 (unmodified opinion)

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CALVADA RETAIL GROUP, INC.

Defendant, Cross-complainant and Appellant.

G055520

(Super. Ct. No. 30-2015-00774882)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed. Motion to Augment Record. Granted. Request for Judicial Notice. Granted.

Law Office of Harry S. Carmack and Harry S. Carmack for Defendant, Cross-complainant and Appellant.

Vogt, Resnick, Sherak and Stephan H. Andranian for Plaintiff, Cross-defendant and Respondent.

Law Offices of Stephan J. Riggs and Stephan J. Riggs for Defendant, Cross-defendant and Respondent.

* * *

INTRODUCTION

Calvada Retail Group, Inc. (Calvada) sought to recover on two guaranty agreements executed respectively by Michael R. Kaplan and Myrna Wickes[1] to guarantee the obligations of Field Time Sports and Guns, Inc. (Field Time) under a retail lease and an extension of that lease. Kaplan sought a declaration that the lease extension was of no force or effect. Following a bench trial, the trial court found the guaranties were unenforceable because Myrna did not have the authority to bind Field Time to the retail lease extension and the lease extension had been procured by economic duress and undue influence. Calvada appealed from the judgment in favor of Kaplan and Myrna.

The trial court, intending to streamline trial proceedings and make them more efficient, exercised its discretion to alter the statutorily-defined order of proof by dividing trial into three phases. The first two phases were devoted, not to any party's case-in-chief, but to affirmative defenses raised by Kaplan and Myrna. The third phase was to address Calvada's case. At the end of the second phase, the trial court took the unusual step of rendering judgment in favor of Kaplan and Myrna without moving to the third phase or permitting Calvada to present rebuttal evidence.

Calvada argues the trial court's method of trying the case denied it due process and the opportunity to present evidence rebutting the evidence from the first two

[1] We refer to Myrna Wickes and her husband, Bob Wickes, and their children, Zachary Wickes and Caley Wickes by first name to avoid confusion and not out of disrespect.

phases of trial. We conclude that altering the order of proof and rearranging trial procedure here created more problems than they solved and led to a false economy. Trial courts have discretion over the order of proof at a bench trial, but ordinarily the order of proof laid out in section 607 of the Code of Civil Procedure should be followed. (Code Civ. Proc., § 631.7.) "[W]hile trial courts are responsible for managing their cases so as to avoid unnecessary delay, they must not elevate misguided notions of efficiency (e.g., a speeded-up trial, or a settlement forced on a party who has been deprived a key witness) over due process." (*Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 353.) As we will discuss in detail, we conclude the trial court erred by changing the order of proof and by not completing all three phases of its revised trial procedure. The record before us demonstrates the reordering of proof caused confusion and should not have occurred.

The trial court's error was harmless, however, because there is sufficient evidence in the record to support the finding the lease extension was procured by exertion of undue influence over Myrna. This finding fully supports the judgment. Calvada does not argue the trial court's rearranging the order of proof prevented it from presenting evidence on that issue. We therefore affirm.

FACTS

I.

The Parties Enter into the Lease and Guaranty Agreements.

Field Time owned and operated a retail store selling guns and related products and services. Bob, Myrna, and Kaplan each owned one-third of the shares of Field Time.

Calvada owns commercial real property in the City of Westminster. Shahraz Danesh is the president of Calvada. In July 2009, Calvada and Field Time entered into a retail lease whereby Field Time leased 11,500 square feet of retail space from Calvada. A retail lease agreement (the Retail Lease) was signed by Danesh and

Bob, who was Field Time's president. The Retail Lease had an initial term of five years commencing sometime between mid-October and mid-November 2009. Base monthly rent was $15,870 with additional rent (for common area expenses, insurance, and operating and maintenance costs) due quarterly in an amount to be estimated by Calvada.

The Retail Lease granted Field Time, if not in default, the option to renew the lease for two terms of five years each (the Renewal Option). Field Time was required to tender written notice to Calvada of the intent to exercise the Renewal Option no later than 180 days before the expiration of the lease term or a prior extension period. For the first five-year extension period, base monthly rent was to increase to $17,294 for the first year and then increase by 3 percent each year over the prior year's base rent. For the second five-year extension period, base monthly rent was to be the greater of 3 percent over the prior year's base rent or fair market rent determined according to provisions of the Retail Lease.

Bob, Myrna, and Kaplan each signed a guaranty of the Retail Lease. All three guaranties (the Guaranties) are identical. Section 1 of the Guaranties states: "Guarantor absolutely and unconditionally guarantees to Landlord the timely payment of all amounts that Tenant may at any time owe under the Lease, *or any extensions, renewals, or modifications of the Lease*. Guarantor further guarantees to Landlord the full, faithful, and timely performance by Tenant of the Lease, *or any extensions, renewals, or modifications of the Lease*." (Italics added.) Section 2 of the Guaranties states the "Guarantor authorizes Landlord, without notice or demand and without affecting Guarantor's liability under this Guaranty, to: [¶] (a) consent to any extensions, accelerations, . . . or to any other alteration of any covenant, term, or condition of the Lease in any respect." The Guaranties have a waiver of defenses provision stating, in part: "Guarantor waives any defense arising by reason of any disability or other defense of Tenant or by reason of the cessation from any cause of the liability of Tenant."

II.

Bob Is Incapacitated; at Danesh's Urging, Myrna Signs a Lease Extension on Behalf of Field Time.

On January 19, 2014, Bob suffered a massive heart attack and stroke while attending a trade show in Las Vegas, Nevada. He was rendered totally incapacitated and unable to attend to the affairs of Field Time. After spending about a month in a hospital in Las Vegas, he was transferred to a hospital in Southern California and placed on life support. Myrna went to the hospital every day to be with Bob. She was "distraught" and "so focused and concerned [about] his condition" that "she had no idea what was going on."

On January 22, 2014, Danesh, who was aware of Bob's condition, called Kaplan to inform him the rent was late. Kaplan told Danesh that Myrna was "entirely in charge" of paying rent, Field Time had been struggling financially, and Kaplan was unwilling to invest more money into the venture without discussing its future with her. Danesh spoke with Kaplan five or six more times. Kaplan told Danesh that Bob's prognosis was "looking worse," Field Time's future depended on Bob's recovery, and Kaplan was unwilling to do anything before speaking with Myrna about Field Time's future. Myrna was not, however, returning Kaplan's telephone calls.

In a telephone conversation on February 5, 2014, Danesh raised with Kaplan the issue of the Renewal Option. Danesh said he wanted Field Time to renew the Retail Lease but, if it did not, he had two other parties interested in opening a gun store at that location and putting Field Time out of business. Kaplan again told Danesh he was unwilling to put more money into Field Time or make major decisions regarding it until he knew of Bob's condition and the future of the business. In a telephone conversation with Danesh on February 11, 2014, Kaplan said he "didn't appreciate being browbeaten to pay the rent and sign the extension" and told Danesh that Myrna did not have authority under Field Time's bylaws to exercise the Renewal Option.

In February 2014, an amendment to the Retail Lease (the Lease Amendment) and a notice of exercise of extension option (the Extension Option) were drafted. The Lease Amendment specified the Retail Lease commenced on November 14, 2009 and ended on November 30, 2014. The Extension Option set forth that Field Time exercised the five-year lease renewal according to the Lease Amendment.

Myrna asked a family friend named Robert Forster to review the Lease Amendment and the Extension Option and advise her whether to sign them. Myrna told Forster the landlord would commence eviction proceedings if she did not sign those documents. Forster advised Myrna to "try to get a shorter term and for no increase in rent." When Myrna met with Forster, she was "[v]ery distraught" and "teary-eyed."

Forster testified he spoke with Danesh several times and told him in one phone call that Myrna was willing to sign the Lease Amendment and the Extension Option if Danesh would negotiate the term of the lease and the amount of rent. Danesh agreed, and the Lease Amendment had the rent reductions requested by Forster. Under the Lease Amendment, base monthly rent for the first five-year extension period remained at $15,870, less than it would have been under the terms of the Retail Lease.

On February 20, 2014, Danesh met with Myrna and her daughter Caley and told them a document was needed to state that Myrna was Field Time's acting president. Danesh told Caley what to put in the document. Based on what Danesh told her, Caley prepared corporate minutes appointing Myrna as Field Time's president. On February 21, 2014, in Danesh's presence, Caley signed the minutes as the corporate secretary even though she did not hold that position. She felt pressured to sign the minutes because Danesh told her if she did not do so, "the lease wouldn't be valid" and "we would get evicted." Myrna signed the minutes as president of Field Time. She too felt pressured and believed she had no choice but to sign the minutes. Danesh told Myrna not to call Kaplan. Zachary signed as treasurer of Field Time even though he did not hold that position.

On the next day, February 22, Danesh met with Myrna and Forster and asked her to sign the Lease Amendment and the Extension Option. Danesh expressed no sympathy regarding Bob's condition and was "cold and clinical" throughout the meeting. Danesh told Myrna if she did not sign, Field Time would be evicted within three days and lose the store. Danesh said that although the lease renewal was not coming up until November he needed to know immediately whether Field Time intended to renew because he had prospective tenants ready to take the space. Forster believed Danesh was "taking advantage of the situation" and trying to "ramrod" the Lease extension through before Myrna was in a better mental state. Nonetheless, Forster testified he advised Myrna to sign and she did so in his presence. Myrna testified that Forster advised her not to sign but she did so anyway because she "felt incredible pressure" and was "not thinking straight." Bob was dying, and Myrna "just felt pressure" to sign.

At the meeting on February 22, Myrna signed the Lease Amendment and the Extension Option as Field Time's secretary. She was not, and had never been, Field Time's secretary. Both the Lease Amendment and the Extension Option include a provision by which Field Time warranted the person signing the document "has the authority to execute this document and bind the corporation to its terms and conditions."

Bob passed away a few days after the Lease Amendment and the Extension Option were signed. Field Time sought Chapter 11 bankruptcy protection in August 2014. After the case was converted from Chapter 11 to Chapter 7, Field Time was liquidated, and it closed its doors on October 31, 2014, before the lease extension took effect.

PROCEDURAL HISTORY

Kaplan commenced this lawsuit by filing a complaint against Myrna, Calvada, and Field Time seeking a declaration that the Lease Amendment and the Extension Option were void and "of no force or effect." Kaplan alleged Myrna was not

authorized to sign the Lease Amendment or the Extension Option on behalf of Field Time and had misrepresented to Calvada that she was authorized to do so.

Calvada brought a cross-complaint against Kaplan and Myrna to enforce the Guaranties, and sought damages under section 22 of the Retail Lease, Civil Code section 1951.2, subdivision (a)(4), and section 1 of the Guaranties. In its answer to Kaplan's complaint, Calvada asserted affirmative defenses including consent and waiver. In his answer to Calvada's cross-complaint, Kaplan asserted defenses including unclean hands, duress, and lack of capacity. In her answer to Calvada's cross-complaint, Myrna asserted defenses including unclean hands, duress, and unenforceability.

Counsel appeared ready for a bench trial on June 12, 2017. On that date, and again on July 3 and 5, the court addressed the order of proof at trial. With input from counsel, the court divided trial into three phase: Kaplan's affirmative defenses (Phase I), Myrna's affirmative defenses (Phase II), and Calvada's case (Phase III). On July 6, after both Kaplan and Myrna rested, the court made findings in their favor. Based on the findings, the trial court ruled trial on Phase III was unnecessary and rendered judgment in favor of Kaplan and Myrna and against Calvada.

A judgment incorporating the trial court's findings was entered. The judgment recites: "The Court ruled in favor of cross-defendants Kaplan and Wickes, and against Calvada. The Court ruled that cross-defendants Kaplan and Wickes had established by a preponderance of the evidence that the guaranty(ies) on which Calvada based its sole cause of action were unenforceable as they related to the extension of the underlying lease agreement, as the extension of the lease agreement had been procured using duress and undue influence by Calvada. In addition, the Court found by a preponderance of the evidence that the extension of the lease was invalid, as Wickes lacked the requisite corporate authority."

Calvada timely appealed from the judgment. Calvada has filed a motion to augment the record with a copy of its trial brief filed on June 12, 2017. The motion,

which is unopposed, is granted. (Cal. Rules of Court., rule 8.155(a)(1)(A).) Calvada also has filed a request for judicial notice of a document entitled "Trustee's Emergency Motion for Order Rejecting Unexpired Lease of Commercial Real Property Under 11 U.S.C. § 365," filed on November 5, 2014 in Field Time's bankruptcy proceeding. The request for judicial notice, which also is unopposed, is granted. (Evid. Code, §§ 452, subd. (d), 459.)

DISCUSSION

I.

Error in the Conduct of Trial Proceedings Was Harmless.

Calvada argues the trial court abused its discretion and denied Calvada due process by rendering judgment after trial on Kaplan's and Myrna's affirmative defenses and by not affording Calvada the opportunity to present evidence to rebut those defenses. Calvada argues the trial court misled it into believing "there would be another 'phase' wherein Calvada would offer its affirmative defenses" and that Calvada could save arguments for its case-in-chief or closing argument.[2]

A bench trial ordinarily proceeds in the order specified by Code of Civil Procedure section 607. (*Id*., § 631.7.) Section 607 prescribes this order: "The plaintiff may produce the evidence on his [or her] part; the defendant may then offer his [or her] evidence; the parties may then offer rebutting evidence only unless the court, for good

[2] In particular, Calvada argues trial exhibits Nos. 245 and 246 show that Field Time ratified Myrna's actions. Exhibit No. 245 is Field Time's opposition to a motion to appoint a Chapter 11 trustee, and exhibit No. 246 is Myrna's omnibus declaration, both filed in Field Time's bankruptcy case. Part of exhibit No. 245 is a declaration from Myrna in which she states: "Shortly before [Bob]'s death, [Bob], Dr. Kaplan and I discussed exercising an option in [Field Time]'s lease to extend the lease for an additional five years. We all decided that it was in [Field Time]'s best interest to extend the lease. The extension agreement was on [Bob]'s desk waiting to be signed when he had his heart attack. He was in the hospital as a result of his heart attack and was unable sign, so I signed the lease extension."

cause, in furtherance of justice, permits them to offer evidence on their original case." (*People v. Katz* (1962) 207 Cal.App.2d 739, 750.)

Although the trial court has discretion to alter the procedure and regulate the order of proof (Code Civ. Proc., § 631.7; Evid. Code, § 320), the court may not exercise that discretion in a manner that prevents a party from presenting relevant, admissible evidence. "'A party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings. . . . [Citation]' It is within the sound discretion of the trial court to define the issues and direct the order of proof but that may not be so done as to preclude a party from adducing competent, material, and relevant evidence which tends to prove or disprove any material issue." (*Foster v. Keating* (1953) 120 Cal.App.2d 435, 451.)

The trial court in this case erred because it altered the order of proof and then did not follow the order of proof it had laid out. Counsel for Calvada relied on the stated order of proof and believed he would have the opportunity to present additional evidence and argument after the first two phases of trial.

Counsel appeared ready for a bench trial on June 12, 2017. The trial court asked counsel questions about their respective theories and the evidence counsel intended to offer to prove them. The court questioned counsel at length about Myrna's authority to bind Field Time to the Lease Amendment and the Extension Option and about Calvada's contention that Field Time had ratified her acts. Then, addressing the order of proof, the court commented: "I began thinking that it was just a legal decision about whether or not guarant[i]es were or were not effective. But now we're getting down to questions of corporate governance, what powers [Myrna] had, and the evidence that you're going to be able to bring me on her authority. [¶] Then assuming that she did have authority to bind the company, then I'm going to have to take step 1 to decide how much her exercise

of—or alleged exercise of authority binds people that are not on the document and, particularly, Mr. Kaplan."

The court continued: "It seems to me the first question is what authority [Myrna] had and whether or not she vowed [*sic*] the exercise, that if she had it, or whether or not she was released or something like that. And I don't need, you know, 250 exhibits that you've given me today to figure that out, or maybe I need another 250 exhibits or something like that. [¶] I'm ready to work with you. You're here for trial. I know you want to get this thing moving along. But I want [to] move efficiently. And I don't want to have just a lot of testimony for no particular reason; I want to know why I'm hearing that testimony and how that helps me decide the case. And I hope that this has suggested to you also maybe some additional documents that I need to look at."

The court requested supplemental trial briefs on the matter of Myrna's authority to bind Field Time to the Lease Amendment and the Extension Option. The parties filed supplemental briefs as requested.

Counsel appeared for trial on July 3, 2017 without a court reporter. The minute order for that date has an entry, "Discussion is held as to the trial logistics." Counsel returned to court on July 5. Referring to the unreported proceedings on July 3, the court stated: "[W]e also talked about the order of proof in the trial, and as I told you, I wanted to begin first with the affirmative defenses that we're going to have to deal with, specifically first from . . . Dr. Kaplan and then from [Myrna]." Calvada's counsel presented a brief opening statement asserting, among other things, that "Mr. Kaplan's guarant[y] specifically waives all the defenses available to Field Time."

The trial continued over July 5 and 6. These proceedings were reported. Kaplan presented evidence to support his defenses to enforcing the Guaranties. Kaplan, Caley, Zachary, Myrna, Danesh, and Forster testified. Danesh was called as a witness by Kaplan and was cross-examined by Myrna's counsel. When cross-examination was completed, the trial court said to Calvada's counsel: "Now this is your witness, Mr.

Carmack. You can defer if you want until you put on your case[-]in[-]chief." Calvada's counsel replied, "I will defer." When redirect examination and recross-examination (by Myrna's counsel) had been completed, the court said to Calvada's counsel, "I take it you're going to reserve." Counsel replied, "Right."

Forster was the next witness called by Kaplan. At the end of the morning session on January 6, before Forster testified, the court again addressed the order of proof, saying: "I cannot tell you what the outcome is going to be while the first phase is still underway. All I can tell you is that at the ends of your case[-]in[-]chief on the affirmative defenses, which I take will be coming up at the conclusion of Mr. Forster's testimony, we will then go to the case[-]in[-]chief of [Myrna], who has—much of his case, I assume, I've already heard, but—and when that is over, then I have a fact question that I have to determine. Normally, I'd give it to a jury if a jury were here, but I have to determine whether or not they get to rest, or whether or not the documents, the legal documents that you're relying upon are enforceable or not. I'll take oral argument on that, and I expect to take oral argument on that. Then I'll rule. *Depending on how I rule, that's when we will proceed with the damages case*. And this is what we discussed several times in the past." (Italics added.)

After Forster testified, Kaplan rested his case. Myra rested without presenting additional evidence. The trial court then stated: "[W]e all have to be supple when we are in trial for unexpected events. I was quite certain this was going to happen, because we are now not only at the end of phase I but the end of phase II. It is not a surprise to me phase I and phase II were put on at the same time . . . . but that now puts before the fact finder, which is me, a number of questions, the answers to which will tell us how or whether we go on to Phase III, which is [Calvada]'s case about the enforceability of the guaranty and unpaid lease and amounts and things like that. [¶] . . . I have some thoughts on it, but I want to go back and look at your briefs again. . . . If you can give me until—an hour, let's say a little bit more than an hour . . . I will come back

and I will tell you my ruling on Phase I and II." The court did not ask Calvada's counsel whether Calvada rested.

Following a recess, the trial court took the bench and placed its ruling on the record. The court made three important findings. First, the court found that Kaplan had placed Danesh on notice that Myrna did not have authority under Field Time's bylaws to bind Field Time to the Lease Amendment and the Extension Option. Second, the court found that Myrna did not become Field Time's de jure or de facto president at any time before Bob passed away. Third, the court found that Myrna signed the Lease Amendment and the Extension Option under economic and emotional duress. The court stated: "What I have found is that Mr. Danesh wrongfully pressured [Myrna] into consenting to the Lease [Amendment and Extension Option] chiefly by stating that there would otherwise be an imminent eviction, contrary to the lease's terms." These findings were carried into a minute order.

After making its findings, the court stated: "The result is that I don't think we go any further. It looks to me like [Calvada]'s case against Mr. Kaplan is gone . . . . [¶] So that is my ruling."

The trial court did not give Calvada the opportunity to present evidence to rebut the cases-in-chief of Kaplan and Myrna or to present its own case-in-chief. Instead, the trial court directed the preparation and entry of a judgment: "So before I end, let me say this: I think we are entitled to a judgment. . . . I think [Myrna] and Mr. Kaplan are both entitled to a joint judgment. [¶] I am going to ask counsel for each of them to jointly prepare, lodge, and serve on [Calvada's counsel] and lodge in the court a proposed judgment . . . consistent with what I have just said. The reason it's going to be lodged is [Calvada's counsel] may have plenty to say about whether or not it covers the waterfront or does what I just said."

The trial court did not follow its own order of proof. The court told counsel the first and second phases of trial would be the "case-in-chief" of Kaplan and Myrna on

their affirmative defenses. But then the court did not permit Calvada to present its case-in-chief, evidence and argument in opposition to Kaplan's and Myrna's cases-in-chief, or evidence in support of Calvada's affirmative defenses. The court gave Calvada's counsel the option of deferring examination of Danesh until the third phase but instead made its ruling after Myrna rested. The trial court's actions prevented Calvada from presenting evidence of ratification and waiver of affirmative defenses. The trial court erred by elevating its "notions of efficiency . . . over due process." (*Fatica v. Superior Court*, *supra*, 99 Cal.App.4th at p. 353.)

The better course of action would have been for the trial court to adhere to the tried and true order of proof laid out in the Code of Civil Procedure. Altering the order of proof created confusion instead of efficiency and, as we have mentioned, led to a false economy. Having altered the order of proof, the trial court should have stuck to it, and should not have asked Calvada whether it wished to defer presenting evidence to a third phase that was never conducted.

The trial court's error, though serious, was harmless because, as we explain in the next section, substantial evidence supported the finding that the lease extension was procured by undue influence. Calvada does not contend the trial court's conduct denied it the ability to present all of its evidence and argument on the issue of undue influence.

II.

Substantial Evidence Supported the Finding of Undue Influence.

Calvada argues the trial court erred by not enforcing the Guaranties against Kaplan and Myrna. Although the trial court found the Guaranties were "legally valid," the court declined to enforce them based on findings that Myrna did not have the

authority to bind Field Time to the Lease Amendment and Extension Option and that they were procured by duress and undue influence.

A guarantor may assert as a defense to the secondary obligation any defense of the principal obligor to the underlying obligation. (Rest.3d Suretyship & Guaranty, § 34(1).) The Guaranties have a waiver of the right to assert as a defense "any of Field Time's defenses against Calvada, including Myrna's lack of authority."[3] Calvada does not argue the waiver of defenses extends to the defenses of economic duress or undue influence. In its opening brief, Calvada argues "the trial court abused its discretion and lacked substantial evidence to find that Calvada was guilty of economic [duress] or undue influence, and *absent that finding*, Calvada argues the waivers are enforceable." At oral argument, counsel for Calvada confirmed that Calvada does not contend the waiver of affirmative defenses extends to economic duress and undue influence.

In applying the substantial evidence standard, our task is to examine the entire record in the light most favorable to the judgment and determine whether there is evidence that is reasonable, credible, and of solid value to support the judgment. (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 682.) We resolve all conflicts in the evidence in favor of the judgment, we do not reweigh the evidence, and we are bound by the fact finder's credibility determinations. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) As a general rule, therefore, we will look only at the

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[3] A guarantor may waive defenses and such a waiver does not violate public policy. (*California Bank & Trust v. DelPonti* (2014) 232 Cal.App.4th 162, 167.) Section 3 of the Guaranties states in relevant part: "Guarantor waives any right to [¶] (a) require Landlord to proceed against Tenant or any other person or entity or pursue any other remedy in Landlord's power; [¶] (b) complain of delay in the enforcement of Landlord's rights under the Lease; and [¶] (c) require Landlord to proceed against or exhaust any security held from Tenant or Guarantor. *Guarantor waives any defense arising by reason of any disability or other defense of Tenant or by reason of the cessation from any cause of the liability of Tenant.* Guarantor waives all demands upon and notices to Tenant and to Guarantor." (Italics added.)

evidence and reasonable inferences supporting the judgment and disregard contrary evidence and inferences. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) The test is whether the record contains substantial evidence in favor of the respondent, and "[i]f this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Ibid.*)

Substantial evidence supported the trial court's finding of undue influence. Undue influence may be found in any of three circumstances: (1) "the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;" (2) "taking an unfair advantage of another's weakness of mind;" or (3) "taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.) "'[U]ndue influence has been called overpersuasion. [Citation.]' [Citations.] In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person." (*Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 451 (*Keithley*).)

"The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition. [Citations.] . . . [O]verpersuasion is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive. These elements are '(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys.'" (*Keithley, supra*, 11 Cal.App.3d at pp. 451-452.)

The evidence at trial established that when Danesh approached Kaplan and Myrna in January 2014 about renewing the Retail Lease, Bob had suffered a massive heart attack and was totally incapacitated. Kaplan testified he kept Danesh apprised of Bob's condition and at one point told Danesh that Bob's prognosis was "looking worse." Both Kaplan and Myrna testified that Myrna was distraught and focused on Bob's condition, and had no idea what was going on at the time. Danesh "browbeat[]" Kaplan about paying the rent and exercising the renewal option and, having no success, went to Caley to persuade her to draft a document naming Myrna as Field Time's acting president. Danesh instructed Caley how to draft the document. Danesh's timing was unusual and inappropriate: Field Time had yet many more months to exercise the renewal option, Bob lay incapacitated in a hospital, and Myrna was in a particularly vulnerable mental state. Danesh told Kaplan, Caley, and Myrna that if Field Time did not exercise the option right away, he had two other parties interested in taking Field Time's space and putting Field Time out of business. Danesh told Myrna that if she did not sign the Lease Amendment and Extension Option then Field Time would be evicted within three days.

Myrna did have the opportunity to consult Forster, but he testified too that Myrna was "[v]ery distraught" and "teary-eyed" whenever they spoke. When Danesh met with Myrna and Forster, Danesh expressed no sympathy regarding Bob's condition and insisted he needed to know immediately whether Field Time intended to renew, even though it had many more months to decide whether to do so. At this meeting, Danesh again stated he had prospective tenants ready immediately to take the space. As Forster testified, Danesh appeared to be "taking advantage of the situation" and trying to "ramrod" the lease extension through before Myrna was in a better mental state. Myrna testified that Forster advised her not to sign but she did so anyway because she "felt incredible pressure" and was "not thinking straight."

Substantial evidence therefore established (1), (3), and (4) of the seven elements of undue influence identified *Keithley*. Most important, and indeed critical to upholding the finding of undue influence, is the substantial evidence that Danesh knew and used excessive pressure to take advantage of Myrna's weakness of mind during Bob's incapacity. "In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 131.)

There was, certainly, evidence contrary to a finding of undue influence. In particular, Myrna did have the opportunity to consult Forster, and there was evidence he was able to negotiate terms somewhat more favorable for her. But the evidence was in conflict on whether Forster advised Myrna to sign the Lease Amendment and the Extension Option: Forster testified he advised her to sign; Myrna testified he advised her not to sign but she did in spite of his advice because she felt "incredible pressure" and was "not thinking straight." Not only must we resolve this conflict in the testimony favorably to the judgment, but also, under either version of the facts, Myrna made the decision to sign the Lease Amendment and the Extension Option while in a vulnerable mental state and under undue pressure from Danesh. Moreover, the standard of review limits our consideration to the evidence supporting the trial court's finding of undue influence. (*Howard v. Owens Corning, supra,* 72 Cal.App.4th at p. 631.)

Calvada does not contend it was denied the opportunity to present all of its evidence on the issue of undue influence, which is a complete defense to enforcing the guaranties against both Kaplan and Myrna. Thus, the trial court's error in reordering proof at trial and then not following that order was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

The judgment is affirmed. In the interest of justice, no party may recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.